



Billing Code 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XC021

Notice of Intent to Terminate the Existing Draft Environmental Impact Statement and Prepare a New Environmental Impact Statement

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: We, NMFS, intend to prepare an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), related to the Makah Indian Tribe's (Tribe) request that we authorize treaty right hunting of eastern North Pacific gray whales in usual and accustomed fishing grounds off the coast of Washington State. This notice briefly describes the background of the Makah Tribe's request for waiver, terminates a prior draft EIS (DEIS), and identifies and requests comments on a set of new potential alternatives currently under consideration.

DATES: Comments and information regarding the proposed revisions must be received (See ADDRESSES) no later than 5 p.m. Pacific Time on August 10, 2012.

ADDRESSES: You may submit comments, identified by [NOAA-NMFS-2012-0104], by any of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

Mail: Send comments to: Steve Stone, Protected Resources Division, NMFS,
1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

Facsimile (fax) to: 503-230-5441.

Instructions: Comments will be posted for public viewing as soon as possible during the comment period. All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. We may elect not to post comments that contain obscene or threatening content. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. If your submission is made via hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review to the extent consistent with applicable law. However, we cannot guarantee that we will be able to do so.

FOR FURTHER INFORMATION CONTACT: Donna Darm, NMFS, Northwest Region, 206-526-6150; or Shannon Bettridge, NMFS, Office of Protected Resources, 301-427-8402. References used in this notice and related information are available via our website at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Index.cfm>.

SUPPLEMENTARY INFORMATION:

Background

On February 14, 2005, we received the Makah Tribe's request for a limited waiver of the Marine Mammal Protection Act (MMPA) take moratorium under Section 101(a)(3)(A) (16 U.S.C. 1371(a)(3)(A)), including issuance of regulations and any necessary permits. The waiver, regulations, and permit would allow the Tribe to continue treaty right ceremonial and subsistence hunting of eastern North Pacific (ENP) gray whales in its usual and accustomed fishing grounds (U&A). The Tribe made the request following the Ninth Circuit Court's decision in Anderson v. Evans, 371 F.3d 475, that the Tribe must comply with the process prescribed in the MMPA for authorizing take of marine mammals. On January 24, 2006, the Tribe requested that we also take any other necessary actions, including under the Whaling Convention Act (16 USC 916 et seq.), associated with a tribal hunt.

The Tribe's waiver request proposes to conduct treaty ceremonial and subsistence harvest in the Tribe's U&A of up to 20 gray whales from the ENP stock in any 5-year period with a maximum of five whales per year, corresponding with aboriginal subsistence whaling limits established by the International Whaling Commission (IWC) in response to a joint request from the United States and Russia. In addition, the waiver request states that tribal regulations would limit the number of gray whales that may be struck to no more than seven in any calendar year, and would limit the number of struck and lost whales to no more than three in any calendar year.

Other tribal regulations proposed in the waiver request include measures to target migrating whales and avoid the intentional harvest of whales that may be part of the Pacific Coast Feeding Aggregation (or Pacific Coast Feeding Group - PCFG). This small

group of gray whales (approximately 200 animals) forages in waters from Northern California to Northern British Columbia, including waters in and adjacent to the Makah U&A during the summer. The measures include allowing hunting only from December 1 through May 30 (avoiding the summer, when PCFG whales predominate), restricting hunting to the coastal portion of the Tribe's U&A (avoiding the Strait of Juan de Fuca, where PCFG whales predominate), and establishing an allowable bycatch level for PCFG whales. The Makah Tribe's proposal includes other standards for hunting, such as: (1) monitoring and adaptive management measures to ensure that any incidental harvest of gray whales from the PCFG remains at or below the annual bycatch level, (2) measures to ensure that hunting is conducted in the most humane manner practicable, consistent with continued use of traditional hunting methods, and (3) measures to protect public safety. The full waiver request is posted online at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Index.cfm>.

On May 9, 2008, we released a draft environmental impact statement (DEIS) that analyzed impacts to the human environment from the Makah Tribe's request and five alternatives, including no action. The alternatives varied the principal components of a hunt, including: the time when whale hunting would occur; the area where whale hunting would occur; the annual and 5-year limits on the number of whales harvested, struck, and struck and lost; cessation of whale hunting if a predetermined number of PCFG whales were harvested; and the method of hunting.

We held three public meetings and received over 300 comments on the DEIS during the 98-day comment period. In the fall of 2008 we began developing responses to these comments and considering whether any new alternative(s) might be needed to

address some comments. A substantial number of comments were concerned with potential hunting impacts on PCFG whales.

Soon after releasing the DEIS, several substantive scientific issues arose that required an extended period of consideration in our NEPA analysis. First, NMFS scientists determined that population estimates for ENP gray whales should be re-analyzed due to potential biases in those estimates. That analysis was completed in December 2009 (Laake et al., 2009) and led to subsequent modeling work by Punt and Wade (2010), who concluded that the ENP stock was within its “optimum sustainable population” size. That conclusion was accepted by NMFS in its stock assessment report for ENP gray whales (Allen and Angliss, 2010), and the papers by Laake (2009) and Punt and Wade (2010) were also reviewed and endorsed by the IWC Scientific Committee. In addition, in 2010 and 2011, researchers studying the genetics of ENP and PCFG whales found evidence of population substructure indicating that PCFG whales may warrant consideration as a separate management unit (Frasier et al., 2011; Lang et al., 2011). More recently, researchers tracking and sampling gray whales discovered that at least some individuals from summer feeding grounds utilized by the endangered western stock migrate across the Pacific and into areas used by ENP gray whales (including the Makah U&A) (Lang et al., 2010; IWC, 2011; Mate et al., 2011; Weller et al., 2011). We have made the studies cited above and related information available on our website (see FOR FURTHER INFORMATION CONTACT).

This information is central to our consideration of the Tribe’s request under the MMPA and to our NEPA analysis. Moreover, the information is also under active consideration by the IWC as part of a regular implementation review of ENP gray whales

to assess whether changes are needed in the international harvest scheme for these whales. The IWC Scientific Committee is scheduled to meet this summer and conclude its review of gray whales by June 23, 2012; the IWC will consider that review at its annual meeting, which ends July 6, 2012. Documents and reports are typically posted on the IWC website at <http://www.iwcoffice.org/meetings/reportsmain.htm>. We encourage interested parties to review these documents and reports as soon as they become available during the public comment period on this notice.

Considerations

Pursuant to NEPA, NMFS must: (1) take a hard look at the environmental consequences of its proposed action to subsequently develop an informed decision; (2) ensure that NEPA reviews provide high quality environmental information via clear and concise documentation; and (3) ensure that the high quality environmental information related to the proposed action is available to the public before the agency makes its decision (40 CFR 1500). In light of the substantial new scientific information described above, and the amount of time that has elapsed since the 2008 DEIS was published for comment, we conclude it is appropriate to formally terminate that DEIS and to begin preparation of a new EIS that is informed by the substantial new information, upcoming IWC proceedings, and public input.

We have identified the following preliminary alternatives for public consideration and comment before the range of reasonable alternatives is finalized. This set of alternatives differs somewhat from those examined in the 2008 DEIS, reflecting public comments we received on the 2008 DEIS and our current understanding of the new scientific information described above. Preliminary alternatives include:

Alternative 1: No Action - Under the No Action Alternative, we would not waive the take moratorium under the MMPA, nor issue the regulations or permits to authorize a tribal hunt.

Alternative 2: The Tribe's Proposed Action – We would waive the take moratorium and issue regulations that would allow us to issue permits to the Makah Tribe to hunt gray whales under the terms proposed in its waiver request.

Alternative 3: Offshore Hunt – We would waive the take moratorium and issue regulations that would allow us to issue permits to the Makah Tribe to hunt gray whales under the terms proposed in its waiver request, except hunting would be allowed only in offshore waters at least three miles from shore.

Alternative 4: Summer-only Hunt – We would waive the take moratorium and adopt regulations that would allow us to issue permits to the Makah Tribe to hunt gray whales under the terms proposed in its waiver request except hunting would only be allowed during the period June 1 through November 30, to minimize the potential for taking a gray whale migrating to or from the western North Pacific.

Alternative 5: Adaptive Management Hunt – We would waive the take moratorium and adopt regulations that would allow us to issue permits to the Makah Tribe to hunt gray whales in the coastal portion of the Tribe's U&A under an adaptive management scheme that would allow for flexibility in: permit terms; hunting seasons; allowable levels of struck, struck and lost, and landed whales up to the levels proposed by the Tribe; and methods of calculating an allowable bycatch level for PCFG whales.

The EIS assessment will identify potentially significant direct, indirect, and cumulative impacts on a variety of resources, including:

- Marine Habitat and Species
- Gray Whales
- Other Wildlife Species
- Economics
- Environmental Justice
- Social Environment
- Cultural Resources
- Ceremonial and Subsistence Resources
- Noise
- Aesthetics
- Transportation
- Public Services
- Public Safety
- Human Health
- National and International Regulatory Environment

For all potentially significant impacts, the EIS will identify measures to avoid, minimize, and mitigate impacts, where feasible, to a level below significance.

Request for Comments

We provide this notice to: (1) advise other agencies and the public of our intentions; (2) obtain suggestions and information on the scope of issues to include in the EIS; and (3) terminate the prior notice of intent to prepare an EIS published on May 9, 2008 (73 FR 26375). In addition to considering the comments we receive in response to this notice in developing a new DEIS, we will consider the comments received on the

2008 DEIS. When we publish a new DEIS we will respond in writing to comments received on the 2008 DEIS. We invite comments from all interested parties to ensure that the full range of issues related to the Makah Tribe's waiver request and all significant issues are identified. We request that comments be as specific as possible. We seek public input on all aspects of our NEPA analysis, including any new information that we should take into consideration; the range of reasonable alternatives; and associated impacts of any alternatives on the human environment.

Comments concerning this environmental review process should be directed to NMFS (see ADDRESSES). See FOR FURTHER INFORMATION CONTACT for questions. All comments and material received, including names and addresses, will become part of the administrative record and may be released to the public.

Authority

The environmental review of continuation of the Makah Tribe's subsistence gray whale hunting will be conducted under the authority and in accordance with the requirements of NEPA, Council on Environmental Quality Regulations (40 CFR 1500-1508), other applicable Federal laws and regulations, and policies and procedures of NMFS for compliance with those regulations. This notice is being furnished in

accordance with 40 CFR 1501.7 to obtain suggestions and information from other agencies and the public on the scope of issues and alternatives to be addressed in the EIS.

Dated: May 11, 2012.

Helen M. Golde,
Acting Director, Office of Protected Resources,
National Marine Fisheries Service.

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